Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| Request for Amendment of the Commission's Rules Regarding Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers | ) | RM No. 9210 |

**REPLY COMMENTS OF AT&T CORP.**
**IN SUPPORT OF PETITION FOR RULEMAKING**

Pursuant to Rule 1.4 of the Commission's rules (47 C.F.R. § 1.4) and Public Notice, Report No. 2246 (issued December 31, 1997), AT&T Corp. hereby submits these reply comments in support of the Petition for Rulemaking filed by the Consumer Federation of America, International Communications Association, and National Retail Federation (collectively, "the Consumer Groups").[1]

The commenters are virtually unanimous -- with the predictable exception of the incumbent LECs ("ILECs") -- in supporting the Consumer Groups' petition for rulemaking.[2] Indeed, a number of parties that originally supported the Commission's market-based approach to access reform now recognize that the assumptions underlying that approach are no longer valid and that the Commission

[1] In re Access Charge Reform, Petition for Rulemaking, CC Docket No. 96-262 (submitted December 9, 1997), designated RM No. 9210 ("Petition").

[2] See Ad Hoc at 1; CompTel at 7-8; Excel at 8-9; MCI at 1-2; LCI at 1-3; WorldCom at 3; CPI at 1; API at 1-2; ACTA at 2; TRA at 1; see also Sprint at 3-4.

thus should adopt new mechanisms to reduce access charges.[3] In the months since the Access Reform Order was issued, numerous court decisions, coupled with the ILECs' intransigence in implementing the Act, have rendered invalid the fundamental premise of the Commission's market-based approach -- that market forces quickly could and would drive access prices toward costs. Therefore, the commenters overwhelmingly agree that prompt action is urgently necessary and in the public interest. The ILECs have conspicuously failed to rebut any of the Petition's major contentions, and their procedural and other policy objections are remarkably devoid of merit.

## I. THE COMMENTERS AGREE THAT THE MARKET-BASED APPROACH TO ACCESS REFORM WILL NOT REDUCE ACCESS CHARGES TO EFFICIENT LEVELS IN THE FORESEEABLE FUTURE DUE TO CHANGED CIRCUMSTANCES.

No commenter disputes that today's access charges substantially exceed economic cost. In the Access Reform Order the Commission elected to rely, in the first instance, on market forces to drive access prices to economic cost, with a "backstop" of prescriptive measures that would be implemented in 2001. Moreover, there can be no serious dispute that the Commission's reliance on market forces was based primarily on the assumption that unbundled network elements ("UNEs") would be widely available at cost-based rates. E.g., Access Charge Reform, CC Docket Nos. 96-262 et al., First Report and Order, ¶¶ 32, 262, 337. In the intervening months, much has changed to invalidate the factual predicate on which the Commission's predictive judgments were based. As a result, "[c]ompetition sufficient for the market-based approach to work has failed to develop, and

[3] See WorldCom at 3; CPI at 1-2.

there is no prospect that such competition will develop in the timeframe the Commission has allotted to the market-based approach." MCI at 9.

In its Comments, AT&T documented in detail numerous changes in circumstances since the issuance of the Access Reform Order that have undermined the assumptions on which the market-based approach is founded (see AT&T at 8-16). Those changed circumstances have been amply confirmed in the Comments:

- The commenters overwhelmingly agree that the Eighth Circuit's decision to vacate Rule 51.315(b) has dealt an especially crippling blow to the possibility of competition based on unbundled network elements.[4] As WorldCom shows (at 9-10), "the damaging fall-out is still being experienced in the local market," as many ILECs now insist that they will physically disconnect UNEs before providing them to CLECs, solely for the purpose of forcing CLECs to incur the cost of recombining them. Indeed, because such arrangements are inherently impractical, the commenters uniformly report that UNE-based competition in the wake of the Eighth Circuit's

[4]See CompTel at 4-5 (vacating Rule 51.315(b) "severely hampered the use of UNEs as a means for introducing wide-scale local exchange and exchange access competition," and the "practical effect" of the ruling is to "undermine the source of prospective competition"); Excel at 4 (Eighth Circuit ruling "severely restricted" the use of UNEs); MCI at 6 (without the FCC's rules, the "scope for UNE-based competition is sharply limited"); LCI at 2 (Eighth Circuit decision "seriously undermined" the assumptions of the Access Reform Order); WorldCom at 10 (with the Eighth Circuit's "evisceration" of the Commission's rules, the promise of competition has been "snuffed out"); CPI at 2 (Eighth Circuit decision will "retard or halt" UNE-based entry); ACTA at 3 (prescription necessary "[w]ith the near evisceration of the Commission's implementation of the Act at hand, especially the destruction of the UNE platform option"); Sprint at 2 (the unbundling decision struck a "serious blow" to competition and increased costs "to the point that it may become physically impracticable or economically prohibitive to offer local service through combined UNEs"); Ad Hoc at 2 (Eighth Circuit decisions will "at least retard the development of competition").

ruling has come to an almost complete halt. See, e.g., LCI at 7 ("as a result of these new requirements, LCI's negotiations with several ILECs to order and test a combination of UNEs known as the 'UNE-Platform' have come to a stand-still").

- Moreover, not only are such restrictions and conditions inherently discriminatory and impractical, but they require CLECs to establish numerous collocation arrangements in many central offices. As LCI demonstrates, collocation usually requires very long lead times, and that fact alone will substantially delay competition even if CLECs attempt to purchase UNE combinations under such conditions. LCI at 7; see also AT&T at 10. And collocation is so expensive that UNE combinations may be infeasible for that reason alone. See LCI at 8 (noting that collocation rates in New York range from $340,000 to $1.4 million per office, and that "the capital investment that a CLEC would have to make to compete using combined UNEs is staggering, and beyond the reach of most, if not all, new entrants"); see also AT&T at 14 n.12; Sprint at 3.

- Other ILECs achieve the same result either by offering UNE combinations only at the resale service rate, which necessarily destroys any possibility of competition in the exchange access market, see, e.g., Excel at 5, or by insisting on additional fees designed to "compensate" the ILECs for fictitious rebundling of UNEs in lieu of actual physical disconnection, see CPI at 6 ("new entrants and state commissions also find themselves grappling with the new issue of special charges for 'gluing' UNEs together"). See AT&T at 10-11.

- The Eighth Circuit also vacated the Commission's pricing rules, which casts continuing doubt on whether UNEs will be available at cost-based rates. See, e.g., CPI at 5 ("[w]hile many states have tended to follow the lead of the FCC by pricing UNEs to reflect economic costs, not all states have done so"); MCI at 6 (in some cases UNE rates "do not allow for competitive entry"); WorldCom at 14 ("final, cost-based interconnection rates remain a rarity"). The problem is especially acute with respect to nonrecurring charges, which in many cases are grossly exorbitant. See MCI at 6; AT&T at 13-14 & n.11.

- Many ILECs also refuse to provide shared transport as a network element, despite the fact that the Commission unambiguously requires it in an unstayed order, and that refusal independently renders UNE combinations infeasible. See WorldCom at 12; LCI at 6-7.

- None of the ILECs has a working operations support systems interface in place, which also makes UNE-based competition impossible. See MCI at 7 (since the Access Reform Order, "it has become clear that [ILECs] are unwilling to provide nondiscriminatory access to their OSS functions"); CPI at 6 ("[t]he competitive forces 'unleashed' by the 1996 Act have proven to be tame indeed, largely because of the failure of the industry to develop a system of back office processes capable of processing the orders that customers will place"); see also WorldCom at 13 ("the ILECs have become adept at slow-rolling their implementation of those policies and requirements they decide to obey"). Indeed, even if the Supreme Court ultimately reverses the decisions of the Eighth Circuit some time in 1999, there is no assurance

that ILECs will provide OSS interfaces at that time that are capable of processing a volume of orders sufficient to support a level of competition widespread enough to constrain access charges.

- The prospects for competition are further clouded by the ILECs' adoption of a strategy of endless legal challenges, in every conceivable forum, to undermine the requirements of the Act and to forestall competitive entry. See WorldCom at 10 ("Armed with rows of lawyers and reams of paper, the ILECs are now busy in virtually every venue in the country attempting to undo many critical components of the 1996 Act"). This includes ongoing litigation over the terms of countless interconnection agreements as well as numerous attempts all over the nation to reopen settled issues before state commissions. See, e.g., WorldCom at 11-12.

As a result of these changed circumstances, the comments overwhelmingly confirm that there is little chance that competition robust enough to constrain access charges will develop in the foreseeable future.[5] As MCI shows (at 5), because UNEs are effectively unavailable, "competitive provision of switched access services is occurring only in the extremely limited situations where competitors are able to serve customers using their own facilities." Facilities-based competition alone, however, holds little hope for widespread competition, because it "requires enormous amounts of time and resources, and is in any event not a viable near-term means of serving most residential consumers." WorldCom at 14-15; see also CompTel at 3. Therefore, WorldCom is surely correct that under today's changed circumstances "there is no realistic wide scale competitive entry strategy

[5]Ad Hoc at 2; CompTel at 3; MCI at 3-5; LCI at 1-2; CPI at 7.

available under the Act to place market-based pressure on access rates." WorldCom at 14. In short, the market-based approach to access reform will not work.

For their part, the ILECs do not dispute that circumstances have in fact changed, and that over the next few years access competition will come almost exclusively, if at all, from facilities-based entry. See especially USTA at 10-11; Bell Atlantic at 5-6, 8-9; see also BellSouth at 4-5; Ameritech at 3, 5-8. Their only response is to argue that substantial competition is developing notwithstanding these changes, but their claims are belied by the facts. Although some ILECs assert (based on undisclosed data) that they have sustained dramatic market share losses in the market for business customers,[6] the New York market share data compiled by the staff of the New York Public Service Commission are probably far more accurate -- and far more telling. See Bell Atlantic at 7-8 & Attachment 1.

According to the NYPSC staff, in New York -- where entry into the local and access markets has advanced much farther than in most states -- new entrants have gained only 5.5% of the business market. More importantly for present purposes, however, almost one third of that entry is via resale (which does not allow entrants to provide their own exchange access), and therefore new entrants have captured only 3.8 percent of the exchange access market for business customers. The numbers for New York's residential market are even more stunning: new entrants have gained only 0.3 percent of the market, and the vast majority of that is through resale. Moreover, these figures surely reflect the unique conditions for competitive entry in New York City, and market share losses are undoubtedly much lower elsewhere. Without widespread availability of UNEs at cost-based rates,

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[6]See USTA at 7-11 & Schmalensee/Taylor Affidavit; Ameritech at 5 & Attachments A-C; BellSouth at 3; GTE at 5-6.

these numbers are unlikely to change very much in the foreseeable future. See Excel at 6 (study shows that without UNEs CLECs cannot reach most of the market); CPI at 7 & n.10 (quoting Merrill Lynch report as saying "[l]ike 1997, we anticipate RBOC share losses will be less than originally expected over the next few years").

In all events, it is clear that the small amount of competition that does exist is having no impact on access charges. As MCI demonstrates (at 3), "with very few exceptions, the price cap ILECs continue to price at the maximum allowed by the price cap index in every basket." Access charges have been reduced only where the Commission has taken action, and not through any market forces. And because circumstances have radically changed since the Access Reform Order was issued, access charges will almost certainly remain impervious to market forces.

## II. THE COMMENTERS AGREE THAT, BECAUSE THE MARKET-BASED APPROACH WILL NOT WORK, THE COMMISSION SHOULD IMMEDIATELY BEGIN IDENTIFYING AND IMPLEMENTING MECHANISMS FOR REDUCING ACCESS CHARGES TO COMPETITIVE LEVELS.

The commenters agree that the Commission can no longer wait for "market forces" to drive down access charges, and must initiate a new rulemaking to identify and implement new mechanisms designed to reduce access charges.[7] The ILECs' contrary arguments are devoid of substance, and in all events are substantially outweighed by the public benefits of immediate action.

[7] See, e.g., CompTel at 7-8; Excel at 8-9; MCI at 2-3, 9; WorldCom at 16-17; CPI at 2-3; API at 11-12.

A few ILECs half-heartedly argue that the Commission should dismiss the Petition as an untimely petition for reconsideration of the Access Reform Order,[8] but they offer no legal authority for such a dismissal and none exists. As U S WEST itself concedes, "[t]o be sure, nothing precludes the Commission from commencing a new rulemaking immediately on the heels of a completed rulemaking on the same subject." U S WEST at 4 n.12. Indeed, the caselaw is clear that, where a "significant factual predicate of a prior decision . . . has been removed" -- as is starkly the case here -- the agency is required to consider initiating a new rulemaking proceeding. American Horse Protection Ass'n v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987); WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981). And the Commission itself explicitly stated in the Access Reform Order that it would resort to the prescriptive "backstop" prior to 2001 "if competition is not developing sufficiently for our market-based approach to work." Access Reform Order, ¶ 267.

Other ILECs erroneously suggest that prescriptive measures would require cost studies that would be burdensome to produce. As AT&T and others have shown, prescriptive measures need not be burdensome because, in the months since the Access Reform Order was issued, the Commission has neared completion of its cost model for universal service and states have made further progress on their own cost models. See AT&T at 23; CompTel at 8-9 & n.14; see also CPI at 8; API at 10 n.20.

In counterbalance to the ILECs' make-weight concerns, the need for prompt access reform is more urgent than ever. As many commenters recognize, excessive access charges harm consumers by artificially inflating interexchange rates and by suppressing demand for those services. See, e.g., Excel at 9; MCI at 2, 9; WorldCom at 16-17. Moreover, above-cost access charges are increasingly

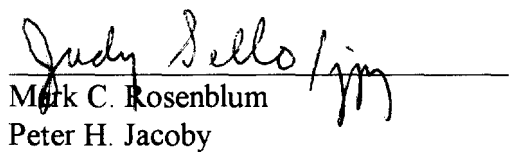
[8] USTA at 2-3; Bell Atlantic at 4; U S WEST at 2-3.

harming interexchange competition itself, because as ILECs begin to offer interexchange service, they can execute anticompetitive price squeezes against their competitors. See, e.g., AT&T at 18, 20-21 (giving examples); Excel at 9-10 & n.14 ("retention of access charges at their current levels will have a disastrously anticompetitive effect" on interexchange competition and noting that evidence already exists of such price squeezes); MCI at 8-9 (noting that Commission found in Access Reform Order that price squeeze unlikely only if UNEs widely available at cost); see also Sprint at 5-6. In light of recent events, the Commission must act quickly to implement new mechanisms for reducing access charges if it is to fulfill Congress' pro-competitive mandate and achieve its goal of cost-based access charges.

## CONCLUSION

For the reasons stated here and in AT&T's Comments, the Commission should promptly issue a notice of proposed rulemaking seeking expedited comment on revisions to the Commission's existing strategy for reducing access charges, and should adopt the necessary reforms.

Respectfully submitted,



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February 17, 1998

## CERTIFICATE OF SERVICE

I, James P. Young, do hereby certify that on this 17th day of February, 1998, I caused a copy of the foregoing Reply Comments of AT&T Corp. in Support of Petition for Rulemaking to be served upon each of the parties listed on the attached service list by U.S. First Class mail postage prepaid.

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